

How to take the road untravelled? European private law in the making

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How to Take the Road Untravelled? European Private Law in the Making

Review Essay of:

Basil S. Markesinis, *Foreign Law and Comparative Methodology: a Subject and a Thesis*, Hart Publishing: Oxford 1997, xxxii + 487 pp.

B.S. Markesinis, W. Lorenz and G. Dannemann, *The German Law of Obligations, Volume I: The Law of Contracts and Restitution: A Comparative Introduction*, Clarendon Press: Oxford 1997, xlvii + 942 pp.

Jan Smits

1. Introduction

It is a commonplace that a new subject within a scholarly discipline - such as the law - tends to suffer primarily from methodological problems. As long as these problems have not been solved, or at least have been provided with an answer, regarded as satisfactory by most of the academics in the field, it is difficult to come to the substance of the new subject. The recent development of the emergence of a 'European private law' is a good example of this phenomenon. On the one hand, most private law scholars (and the same goes for European practitioners although they are not as outspoken as their colleagues in the Universities) agree that some sort of harmonisation, unification, or even codification of private law in Europe should be realised. They reason that a truly single European market cannot properly function without a common private law. Private law (in particular the law of contract) is after all the backbone of economic activity and if there are too many differences between the legal systems of different countries, having for a consequence uncertainty, this activity is severely hampered, even if the feelings of business partners are more of a psychological nature than based on real differences.¹ On the other hand, however, there is a widespread disagreement about *the way* this new *ius commune europaeum* should be established. This has led to an already vast amount of literature, concerned with this methodological question;² compared to the few publications that are mainly concerned with substance,³ the emphasis on methodology is striking. This is all to be explained from the common sense feeling that substance is a risky business as long as there is no relative consensus on the methodology *to come to* substance.

In this review essay, I will try to categorise the present attempts at creating a European private law and critically discuss these attempts in the light of recent practical and theoretical literature. There is every need to do this since the formerly rather narrow and 'positivist' (namely focusing on rules) discussion on European private law is now broadening very fast. Over the last two years, theories inspired by sociology and cultural sciences,⁴ public law⁵ and legal theory itself⁶

¹Jürgen Basedow, *Un droit commun des contrats pour le marché commun*, 50 *Revue Internationale de droit comparé* (1998), 7 argues that psychological feelings about *feared* differences maybe more important then the existence of true differences. Likewise, the psychological impact of a European Civil Code would be bigger then it is usually thought.

²For an overview of literature in general on European private law see Ewoud Hondius, *Towards a European Civil Code*, 2nd. ed., Nijmegen 1998, 3.

³Cf. par. 2.3.1.

⁴See in particular the writings of Pierre Legrand who, influenced by ideas from the cultural sciences and language theory, has argued that a European Civil Code is not feasible (see par. 2.2.3).

⁵Daniela Caruso, *The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration*, 3 *European Law Journal* (1997), 3.

⁶See, e.g., Bert van Roermund, *We, Europeans; On the Very Idea of a Common Market in European Community*

have enriched the discussion. Special attention is paid to two recent books by Basil Markesinis, one concerning methodology and one concerning substance. This emphasis on Markesinis' views is appropriate since he is one of the few authors who is able to show the results in practice of a more or less worked out theory on (and methodology of) comparative law. The essay thus tries to compare the present attempts at creating a European private law with the method, proposed by Markesinis.

It is thus the European private law *in the making*⁷ that is discussed here. And although some of the proponents of this possibly new *ius commune* refer to that period of time in which a *true ius commune* did exist in Europe (mainly in the 17th and 18th century),⁸ there can be no doubt about it that the road that has to be travelled is a new one. Present times can hardly be compared with the cultural and legal climate in that time foregone, in which all lawyers spoke the same language and were all part of one unified culture, let alone that private law rules were to a far lesser extent imposed upon the nationals by states than has been the case since the great private law codifications of the 19th and 20th century. So we really have to travel a road not travelled before.⁹ That makes the methodological questions even more difficult, but - of course - also far more exciting. To use the language of the former *ius commune*: it is *terra incognita* and if a warning had to be given before entering the area, it would probably be *hic sunt leones*, not only because of the presence of the wasteland itself, but also because of the many authors that attempt to find their way through it.

2. A Categorisation of Attempts to Create a European Private Law

2.1 A twofold distinction

How to tame the lions? A simple categorisation of the attempts to create a European private law seems to be a good starting point. The categorisation presented here is based on the distinction between state imposed and non-state imposed law. With state-imposed law I mean simply that it is the official state organs (including those of the European Union) who *ratione imperii* impose the law on their nationals (e.g. in Acts of Parliament) or (in the case of the EU), on the European Member States or on the individual members thereof. These two ways of creating a European private law have to be clearly distinguished, not to implement the discussion in a more or less outdated positivistic framework, but for practical reasons. In the former situation, the discussion is after all mainly concerned with questions of competence. Does the EU-Treaty create competence for the European organs to implement a European Civil Code? If not, should such competence be created?¹⁰ In the latter situation, questions of competence are far less important. Here, the emphasis lies much more on a discussion on the many subtle ways a European private law can be created in another way than through the enactment of a Code. Here, e.g., the discretion of the judiciary to use comparative law arguments, or the role of the universities, should be discussed.

Law, in *Law, Life and the Images of Man (Festschrift Broekman)*, Berlin 1996, 455; Mark van Hoecke, Mark Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, 47 *International and Comparative Law Quarterly* (1998) 495; J.M. Smits, *Eenheid en verscheidenheid in het contractenrecht*, 27 *Rechtsfilosofie & Rechtstheorie* (1998), 10.

⁷Cf. H.C.F. Schoordijk, *Enkele opmerkingen over de bronnen van verbintenis en 'European law in the making'*, *Europees contractenrecht*, Arnhem 1995, 95.

⁸See in particular the many writings of Reinhard Zimmermann (referred to in note 55). Pierre Legrand, *Against a European Civil Code*, 60 *Modern Law Review* (1997), at 58, rightly points out that this is a somewhat Romantic presentation of reality since English law was not part of this *ius commune*.

⁹cf. Legrand, 60 *MLR* (1997), 48.

¹⁰These questions were widely discussed on a conference in The Hague in February 1997; see Martin Schmidt-Kessel, 52 *Juristenzeitung* (1997), 1052; Winfried Tilmann, *Towards a European Civil Code*, 5 *Zeitschrift für Europäisches Privatrecht* (1997), 595.

2.2 A European private law by imposition

2.2.1 Unification through treaties and harmonisation through EU Directives

It does not come as a surprise that the traditional way of achieving uniformity, i.e. through binding treaties between different countries, has not had much success in the field of private law. The need for every country's agreement to the treaty makes it not very likely that hard and fast rules can be formulated and it is not too bold to say that most of the substance of private law is not covered by treaties. The presence of the Convention on the International Sale of Goods 1980 and of treaties in the field of bills of exchange and cheque law and of liability for damages caused by nuclear activities and transportation law cannot convince me to reach another conclusion. And even where ratification has taken place, problems of interpretation usually arise since mostly no mandatory judicial procedure is provided. A uniform application of the treaty is then virtually impossible.¹¹

The most widely used method of achieving a higher degree of uniformity between the private law systems within the European Union has up till now been through Directives issued by the European Union.¹² Directives are binding as to the result to be achieved by the Member States (art. 189 3 EEC-Treaty), while the form and method for implementing it can be chosen by the Member State itself. Thus, harmonisation leads to a European 'law of uniform results', be it that the rules that bring these results about are national in character. The European Court of Justice can not interpret these national rules, but it can interpret the Directive itself, bringing about uniformity in the interpretation of the concepts in the Directive. Thus, private law can be harmonised, but only in the field of rules deemed to be required for the establishment and functioning of the Single Market (art. 100, 100A, 235 EEC-T).¹³ Family law, the law of inheritance and property law (cf. art. 222 EEC-T¹⁴) are not considered to be necessary for the development of the Single Market, meaning a competence does not exist; this has for a consequence that it is mainly the rules, connected with the protection of the European citizen on the Single Market, that the Directives are concerned with.¹⁵ So, Directives have been issued on, e.g., doorstepselling (1985), self-employed commercial agents, consumer credit contracts (1986), package travel contracts (1990), unfair terms in consumer contracts (1993)¹⁶, timesharing (1994) and - in the field of tort law - products liability (1985).

But as wide the use of Directives in the field of private law has been over the last fifteen years, as many disadvantages of this method of harmonisation have come to the surface. Firstly: the emphasis on consumer protection as the motor of private law development within the European Union has given the harmonisation process an only limited drive: Directives have resulted in European private law for a very limited area, driven by 'a feeling for actualities', as Müller-Graff has recently called it.¹⁷ The result is 'a Brussels brick here and there'.¹⁸

Secondly: the character of harmonization - the objectives are centrally formulated, but the way in which they are attained are at the discretion of the Member States - also entails that the Member States are responsible for bringing their law in line with the Directive. As a result of this

¹¹See Peter-Christian Müller-Graff, Private Law Unification by Means other than of Codification, in *Towards a European Civil Code*, 1st ed., Nijmegen 1994, 23. Other disadvantages of this method are evident, such as the very complex private international law relationships that arise between countries that have and that have not ratified the treaty.

¹²See Peter-Christian Müller-Graff, EC Directives as a Means of Private Law Unification, in A.S. Hartkamp et al (eds.), *Towards a European Civil Code*, 2nd. ed., Nijmegen 1998, 71. A seven pages-list of Directives is presented there.

¹³Oliver Remien, Illusion und Realität eines europäischen Privatrechts, 47 *Juristenzeitung* (1992), 277.

¹⁴See Steven Bartels, Europees privaatrecht: over de bevoegdheidsverdeling tussen Unie en Lid-Staat m.b.t. het eigendomsrecht, 44 *Ars Aequi* (1995), 244.

¹⁵Cf. Gerardo Brogini, Was bedeutet heute gemeineuropäisches Vertragsrecht? 38 *Zeitschrift für Rechtsvergleichung* (1997), 221, at 223.

¹⁶See the special issue of 5 *European Review of Private Law* (1997), 2.

¹⁷Müller-Graff, *Towards*, 82.

¹⁸Oliver Remien, 'Über den Stil des Europäischen Privatrechts', 60 *RebelsZ* (1996), 8.

embedding into national law, it is difficult to establish, after a Directive has been issued, whether and to what extent implementation and judicial interpretation have left uniformity intact.¹⁹

Finally, and from a more dogmatic point of view: since private law is a system, the introduction of one single Directive into that system may lead to the introduction of *Fremdkörper*, by which not only the unification is not successful, but also the unity of the private law system itself is endangered. I should add that, recently, Tonner²⁰ and Micklitz²¹ have argued that this argument against harmonisation is not to be taken too serious since these rules of European origin (especially in the field of consumer law and company law) can play the role of precursors of a future European private law. According to them, these new special rules will lead the way for the general rules of classic private law in just the way commercial law led the way in the 19th century for general private law. In my opinion, this leaves unanswered the problems as to how the unity of the private law system should be solved during the transition period.

The making of a complete European Civil Code does - according to most authors and for the reasons set out above - *not* belong to the competence of the European Union. Thus, most civil law is under the principle of subsidiarity left to the Member States. Jürgen Basedow however has recently argued that a European Civil Code in the field of contract law can be based on art. 100A sqq. EEC-Treaty. This would mean that European contract law could be imposed upon the Member States and their nationals by regulation.²² Of course, the political will to do so, should be there and in my opinion it is not very likely that a majority could be reached regarding the substance of the common rules. In any case, it is not too audacious to state that the call from the European Parliament in 1989 and 1994 that a European Civil Code should be made,²³ will not be answered by the Commission in the near future.

2.2.2 A European private law through the judgments of the European Court of Justice and of the European Court of Human Rights

Although in general not seen as an independent way of establishing a European private law, it cannot be denied that in particular the activities of the European Court of Justice (ECJ) in Luxemburg have contributed in the past and will probably even more contribute in the future to the development of a European private law.²⁴

Institutionally, the situation is clear. Directives that have been implemented in national law have to be interpreted by the national courts in a way that is 'Europe friendly' enough.²⁵ The role of the ECJ is to bring about uniformity in the interpretation of concepts of the Directive through the preliminary ruling procedure of art. 177 EEC-T. Although the ECJ has thus in principle been

¹⁹See, for instance, Müller-Graff, *Towards*, 1st ed., at 22 sqq. For other objections to harmonisation through Directives see Kapteyn/Verloren van Themaat, *Introduction to the Law of the EC*, 2nd ed., Deventer, 1989, 478.

²⁰Klaus Tonner, *Die Rolle des Verbraucherrechts bei der Entwicklung eines europäischen Zivilrechts*, 51 *Juristenzeitung* 1996, 533.

²¹Hans-W. Micklitz, *Perspektiven eines Europäischen Privatrechts*, 6 *Zeitschrift für Europäisches Privatrecht* (1998), 253, at 263.

²²Of course, in the end it is a question of political will and not so much of literal interpretation of the EC Treaty. Basedow, *Revue Internationale de Droit Comparé* (1998), 7. For an overview of elder (German) literature see Christian Armbrüster, *Ein Schuldvertragsrecht für Europa?*, 60 *RabelsZ* (1996), 72.

²³Resolution on Action to Bring into Line the Private Law of the Member States, *O.J. EC* 1989 C 158/400; Resolution on the Harmonization of Certain Sectors of the Private Law of the Member States, *O.J. EC* 1994 C 205/518. On the second resolution: Winfried Tilmann, *Zweiter Kofifikationsbeschluss des Europäischen Parlaments*, 3 *Zeitschrift für Europäisches Privatrecht* (1995), 534.

²⁴Walter van Gerven, *ECJ Case-law as a Means of Unification of Private Law?*, in 5 *European Review of Private Law* (1997), 293 and reprinted in *Towards*, 2nd. ed., 91.

²⁵See for this 'Europafreundliche Auslegung' Christian von Bar, *Vereinheitlichung und Angleichung von Deliktsrecht in der Europäischen Union*, 35 *Zeitschrift für Rechtsvergleichung* (1994), 221, at 231; cf. Stefan Grundmann, *Richtlinienkonforme Auslegung im Bereich des Privatrechts*, 4 *Zeitschrift für Europäisches Privatrecht* (1996), 399.

given an important instrument to unify in those fields of law that have been covered by Directives, practice is different. Van Gerven has recently pointed out that the ECJ's case law concerning the interpretation of Directives is, compared to the interpretation of the Treaty itself, not very audacious, but rather of a textual nature.²⁶ The Court's contribution to unify law by this interpretation method has up till now been rather modest.²⁷

In another way, the contribution of the Court of Justice to the development of a *ius commune* has been more important, namely in the field of tort law. As is well known, in the *Francovich* case,²⁸ the Court has established that a Member State that has not implemented a Directive at all, is liable in tort for the damage caused to the plaintiff, provided some specific requirements have been satisfied (e.g. that the Directive intended to grant rights to individuals and that the contents of these rights could be determined). In the *Brasserie* case,²⁹ the Court stated that State liability does also exist where directly effective Treaty provisions have been violated. The unifying effect of these cases is clear: national rules that are incompatible with these judgments cannot any longer be part of the national legal system. The new rules replace pre-existing and diverging national provisions.³⁰ Moreover, a beginning of uniform interpreting concepts like harm and causation is there.³¹ Of course, the real breakthrough would be if the ECJ would affirm a remedy should be available for breaches of Community law *by individuals*.

In other fields of private law than tort law, the role of the ECJ has been modest. So, for instance, in the field of contract law. As one of the reasons for this, as Van Gerven has pointed out,³² is to be mentioned that art. 215 EEC-T states that matters of contractual liability of the Community shall be governed by the law applicable to the contract in question; the ECJ does thus not feel compelled to search for common principles. Nevertheless should I make mention of one important judgment of the ECJ in the field of company law, but with effects for general contract law. In the *Marleasing* case,³³ the ECJ has set aside the requirement of *causa* for the valid formation of (at least some types of) contract on the basis that in the Directive 68/151 among the grounds for voidness of the (contract to found a) company, *causa* was not mentioned. This case is - as Bassoni and Mincke have showed - not only of significance for Spanish law, but also for other countries where *causa* still is an official requirement for formation of contract.³⁴

This overview of attempts to create a *ius commune* would not be complete without mentioning the contribution of the European Court of Human Rights in Strasbourg. This contribution has up till now been the most important in the field of European family law, where, e.g., many discriminating national rules have been set aside on the ground of Art. 8 European Convention of Human Rights (protection of family life)³⁵ and in the field of civil procedure.³⁶ Potentially of great importance in the field of property law is Art. 1 of Protocol 1 of the ECHR, protecting every person's 'peaceful enjoyment of his possessions'. The ambit of this provision has up till now been

²⁶Van Gerven, 5 *ERPL* (1997), 295.

²⁷See Van Gerven, 5 *ERPL* (1997), at 304, for an example of a possible unifying interpretation of 'good faith' in art. 3 of the Directive on Unfair Terms in Consumer Contracts 1993.

²⁸Cases C-6/90 and 9/90 [1991] *ECR* I-5357. On *Francovich* see W. van Gerven, Bridging the Unbridgeable, 45 *International and Comparative Law Quarterly* (1996), 507 and M.H. Wissink, *Sociaal Economisch Weekblad* 1997, 78.

²⁹Cases C-46/93 and C 48/93 [1996] *ECR* I-1029.

³⁰Maria Luisa Fernandez Esteban, National Judges and Community Law: The Paradox of the Two Paradigms of Law, 4 *Maastricht Journal of European and Comparative Law* (1997), 146, also on the birth of a *ius commune*.

³¹Van Gerven, 5 *ERPL* (1997), 300. As far as the liability of the Community institutions and its civil servants (and not of the States themselves) is concerned, art. 215 EEC-T explicitly states that liability exists 'in accordance with the general principles common to the laws of the Member States'.

³²Cf. Van Gerven, 5 *ERPL* (1997), 301, also for other reasons.

³³13 November 1990, C-106/89 (*Marleasing SA/La Comercial*).

³⁴Vittoria Bassoni, Wolfgang Mincke, Europa sine causa? 5 *Zeitschrift für Europäisches Privatrecht* (1997), 599.

³⁵For an overview: Dieter Martiny, Is Unification of Family Law Feasible or Even Desirable? in *Towards*, 151.

³⁶Cf. for an overview of case law on the basis of art. 6 ECHR (fair trial) Konstantinos Kerameus, Procedural Implications of Civil Law Unification, in *Towards*, 130.

rather unclear;³⁷ the article might however very well become of importance in future cases, in particular in countries where national constitutional review is not allowed (as is for instance the case in The Netherlands). It goes without saying that the development of a *ius commune* in this way can only be fragmentary and slow.

2.2.3 Pierre Legrand and the Contrarian Challenge

Overlooking these attempts to create a European *ius commune* through a classic State oriented method, the result is not encouraging for those who have put their hopes on the official State (or European Union) institutions. Leaving aside the very improbable unification by way of treaty, the remaining methods can only be characterised as fragmentary; for the issuing of an entire Code, competence of the European Union seems to be lacking under the principle of subsidiarity, although if the political will is there, this problem could be overcome. But then another problem arises. Even if a European Civil Code *could* be made, the question is to be raised whether it will be *successful* in the sense that it does really have a unifying effect. Here, I should make mention of the work of Pierre Legrand,³⁸ who has eloquently argued that a European Civil Code is not feasible.

Inspired by cultural studies and modern philosophy and sociology, Legrand takes as a starting point that merely drafting uniform *rules* does not result in uniform *law*. Law is, after all, much more than just formally uniformed rules: the meaning of a particular rule in a particular cultural and national context can only be established after studying that context. And this context, the legal *mentalité*, differs between the various cultures.³⁹ According to Legrand, the *mentalités* are even irreconcilable in the case of continental and English law. Epistemologically, the reasoning in common law is inductive with an emphasis on facts and legal precedent; in civil law the focus is on systematization.⁴⁰ Whereas civilian lawyers try to fit a legal decision into a logical system, Anglo-American jurists abhor formal rules and consciously choose to counteract continental Civilian influence. This choice derives from unbridgeable cultural differences. Legrand has put forward some other arguments as well: the whole idea of a European codification is arrogant in his view, because it imposes on common lawyers the supposedly superior world view of continental lawyers. They each offer different accounts of reality and those preaching codification of private law consider the Anglo-American reality as without merit. A European Civil Code is only in the interests of the European economy and consequently cultural differences must disappear.⁴¹ Furthermore, the suggestion that Europe will return to a Golden Age of a true *ius commune* is misleading, because English law was never part of it. All this has led Legrand to the conclusion that 'legal systems (...) have not been converging, are not converging and will not be converging.'⁴² What the comparatist should do, is engage in activities to meet the 'contrarian challenge'. This approach⁴³

'commits the comparatist to a critical or subversive vocation through the denunciation of any impression suggesting that the law's precepts somehow have an autonomous existence in the sense that they would be self-constituting. No

³⁷see Francis G. Jacobs, Robin C.A. White, *The European Convention on Human Rights*, 2nd. ed., Oxford 1996, 246.

³⁸Pierre Legrand, European Legal Systems Are Not Converging, 45 *International and Comparative Law Quarterly* (1996), 52; Sens et non-sens d'un Code Civil Européen, *Revue Internationale de Droit Comparé* (1996), 779; Against a European Civil Code, 60 *Modern Law Review* (1997), 45.

³⁹Legrand, 45 *ICLQ* (1996), at 60, cf. 60 *MLR* (1997), at 59: 'jus is not reducible to lex'.

⁴⁰Legrand 45 *ICLQ* (1996), at 74; 60 *MLR* (1997), at 46 sqq.

⁴¹Cf. Pierre Legrand, Comparative Legal Studies and Commitment to Theory, 58 *MLR* (1995), 262, at 272: 'must we accept that legal culture be made subservient to the ethos of capital and technology in an instrumental and ahistoricist re-invention of Europe?'

⁴²Legrand, 45 *ICLQ* (1996), at 61-62.

⁴³Pierre Legrand, Buchbesprechung of Bernard Grossfeld, Kernfragen der Rechtsvergleichung, 62 *RabelsZ* (1998), 315-316.

matter how much a text may project an image of completeness or definitiveness or intemporality or self-governance (and irrespective of how much this autonomy may be wanted by lawyers), *in fact* a text is always overdetermined, or constituted by, the culture or tradition which it inhabits'.

In my opinion, Legrand's views can be criticised on the ground that his arguments are not so much directed against a European private law, but much more against a Code that is imposed by State authority.⁴⁴ But the lion's share of Legrand's argumentation is to the point. It cannot be denied that a legal rule can only be understood as part of the culture it is part of and as long as there is no truly European (legal) culture,⁴⁵ divergences will not disappear. Basedow⁴⁶ has argued that, although there are differences between the various legal cultures, there also exists something of this European legal culture. I will not go into this debate; it is, however, crystal clear that there still are characteristic differences between legal systems in the field of history, method, legal sources, ideology, judicial style, language,⁴⁷ etc.⁴⁸

I have argued in a previous article⁴⁹ that because of the methodological problems Legrand has embarked upon, we should abstain from making a European private law by imposition, but should concentrate on other methods. A *caveat* however should be given: one could be inclined to think that the non-State imposed methods of coming to a *ius commune*⁵⁰ have nothing to do with a political will to create one. I would consider this as a fallacy: the national States or the European Union could very well be proponents of a European private law, at the same time *not* intervening to create one. The 'voluntary creation' can take different forms; three of these are to be discussed underneath.

2.3 A European private law by voluntary creation

2.3.1 Legal Science and Legal Education

The first method to be discussed here is the creation of a European private law by legal science and legal education.⁵¹ Its adherents assert that just like the *ius commune* of the 17th and 18th century was a legal system, primarily made at the Universities, a new *ius commune* should find its origin there as well. Departing from that starting point, students could be raised in a European legal fashion and practitioners could benefit from the comparative legal material, made available to them by scholars. Thus, it would be by 'reception' that in the end a *ius commune europaeum* will emerge.⁵² The one author who would deserve a separate treatment for that matter, is Reinhard Zimmermann. In his many (partly programmatic) writings, he has emphasised that⁵³

'the essential prerequisite for a truly European private law would appear to be the emergence of an "organically

⁴⁴See J.M. Smits, Een Europees privaatrecht als gemengd rechtstelsel, 73 *Nederlands Juristenblad* (1998), 61 (published as A European Private Law as a Mixed Legal System in 5 *Maastricht Journal of European and Comparative Law* (1998); Legrand himself would probably not agree on this; cf. Pierre Legrand, The Impossibility of 'Legal Transplants', 4 *Maastricht Journal of European and Comparative Law* (1997), 111.

⁴⁵If a uniform European (legal) culture would exist, Legrand's objections could be overcome. In Legrand's view however, 'the understanding of diversity' is indispensable because of the incommensurability across legal traditions (60 *MLR* (1997), 62).

⁴⁶Jürgen Basedow, Rechtskultur - zwischen nationalen Mythos und europäischem Ideal, 3 *Zeitschrift für Europäisches Privatrecht* (1996), 379. See for criticism on Legrand also Gunther Teubner, Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences, 61 *Modern Law Review* (1998), 11.

⁴⁷Pierre Pescatore, Recht in einem mehrsprachigen Raum, 6 *Zeitschrift für Europäisches Privatrecht* (1998), 1 argues however that in the end only two legal cultures (civil law and common law) exist.

⁴⁸Cf. Oliver Remien, Über den Stil des europäischen Privatrechts, 60 *RabelsZ* (1996), 1.

⁴⁹Smits, 73 *NJB* (1998), 61.

⁵⁰Cf. Alternativen zur legislatorischen Rechtsvereinheitlichung, 56 *RabelsZ* (1992), 215.

⁵¹Cf. Axel Flessner, Rechtsvereinheitlichung durch Rechtswissenschaft und Juristenausbildung, 56 *RabelsZ* (1992), 243.

⁵²Cf. Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, 3rd. ed., Oxford 1998, v.

⁵³David L. Carey Miller and Reinhard Zimmermann (eds.), *The Civilian Tradition and Scots Law*, Berlin 1997, 293.

progressive" legal science, which would have to transcend the national boundaries and to revitalize a common tradition'.

The magnificent merit of Zimmermann is that he has not halted at this programmatic statement, but has shown us how legal scholarship can attribute to the coming into being of a European private law. Of the utmost importance have been his publications on the so-called 'mixed legal systems'. One of the major problems in a *ius commune* would after all be the 'mixing' of civil law and common law elements; for that matter, we can draw inspiration from the legal systems where this has already been done. Especially the experience in South-Africa and in Scotland is consequently of great importance for the future development of European private law.⁵⁴

Allow me to make two remarks on the method of '*ius commune* through legal science'. First, it should be noted that regarding the historical argument that a *ius commune* has existed in the past and can serve as a model to us now, legal historians are not unanimous. On the contrary, the argument is so controversial that two schools of thought have developed. On the one hand, the adherents of 'Neohistorismus' claim that we should try to study the legal past with no other purpose than the pure pursuit of knowledge. Studying the long history of private law gives us no clue whatsoever as to its future development, even if a *ius commune* has existed in the past.⁵⁵ On the other hand, the adherents of 'Neopandektismus' argue that there has been a *ius commune* and that it can serve as an example on the winding road to a European private law.⁵⁶ Without trying to solve this controversy, I should say that - thinking along the lines Hoetink has set out⁵⁷ - it is impossible to look objectively to the past and that it is many times fruitful to abuse the past for present purposes. So, even if we use the former *ius commune* in a somewhat unscientific way, it can serve a purpose.

Secondly, it is worth noticing that in this view, the role of legal science in the common law should be very different from the role it has had in the past. Indeed, in European continental law, legal scholars have always been the forerunners, developing a dogmatic system where practice can benefit from. English law however has been much more practice oriented and not so willing to accept scholarly insights in the solving of cases. Although there are signs that in English law, one is more and more inclined to think along continental lines,⁵⁸ a true change of *mentalité* has not yet taken place. With so different mentalities in civil law and common law, it makes it difficult to believe that legal science can play the role in England it plays on the Continent.

What have been the scholarly efforts so far? Apart from the classic book by Zweigert and Kötz,⁵⁹ in which the national systems are compared on the basis of legislation and cases without the

⁵⁴Reinhard Zimmermann and Daniel Visser (eds.), *Southern Cross; Civil Law and Common Law in South Africa*, Oxford 1996; David L. Carey Miller and Reinhard Zimmermann (eds.), *The Civilian Tradition and Scots Law*, Berlin 1997.

⁵⁵Disputed by, e.g., W. Brauner, *Europäisches Privatrecht; aber was ist es?* 15 *Zeitschrift für neuere Rechtsgeschichte* (1993), 225; cf. J.A. Ankum, *Stenen voor brood*, 42 *Ars Aequi* (1993), 459 and for an overview of literature Gert Steenhoff, *The Place of Legal History in the Teaching of Law and in Comparatists Formation*, in E.H. Hondius (ed.), *Netherlands Reports to the 15th International Congress of Comparative Law (Bristol 1998)*, Antwerpen 1998, 1.

⁵⁶See, e.g., Reinhard Zimmermann, *Roman Law and European Legal Unity*, in *Towards*, 21; same author, *Das römisch-kanonische ius commune als Grundlage europäischer Rechtseinheit*, 47 *Juristenzeitung* (1992), 8; same author, *Savigny's Legacy*, 112 *Law Quarterly Review* (1996), 576; *Konturen eines Europäischen Vertragsrecht*, 50 *Juristenzeitung* (1995), 477; H. Kötz, *Was erwartet die Rechtsvergleichung von der Rechtsgeschichte?*, 47 *Juristenzeitung* (1992), 20; W. van Gerven, *In het verleden ligt de toekomst van een Europees ius commune*, 59 *Rechtskundig Weekblad* (1996), 1430.

⁵⁷H.R. Hoetink, *Les Notions Anachroniques dans l'Historiographie du Droit*, in *Opera Selecta*, Zutphen 1986, 216. I have used this argument before in J.M. Smits, *De noodzaak en de mogelijkheid van rechtsvergelijking in het civiele recht*, *Weekblad voor Privaatrecht, Notariaat en Registratie* 6154 (1994), 728.

⁵⁸See, e.g., Peter Birks (ed.), *The Classification of Obligations*, Oxford 1997, where it is argued that the more intuitively determined common law classification should make place for a taxonomy.

⁵⁹The translation of the 3rd. German edition (1996) has been published in 1998: Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, 3rd. ed., Oxford 1998.

ambition to try to draft common rules for political purposes and apart from Markesinis' book to be reviewed underneath, three recent books should be mentioned.⁶⁰ Kötz has published volume I of a textbook on *European Contract Law*; the second volume by Flessner is forthcoming.⁶¹ In Kötz' book, it is explicitly admitted that *before* a European Civil Code can be successful, the way lawyers think should be 'Europeanised'. Kötz writes that 'all that is needed to constitute European private law is to recognise it' and that can be brought about by having books which disregard national boundaries in order to show us the common principles, and an education of lawyers in the European *ius commune* (preface). Secondly, a revised and expanded edition of *Towards a European Civil Code* has been published in 1998.⁶² The 37 authors have been asked not to discuss the *feasibility* of a European Common law, but to address directly the substantial matter of the possible *content* of common rules.

Separate mention should be made of the publication of Christian von Bar's *Gemeineuropäisches Deliktsrecht* in 1996.⁶³ In this 'ganz normales Lehr- und Handbuch' (as the author calls it himself; it is much more than that), the rules of tort in the codified systems and in the Scandinavian and Common law systems are considered: a description of the positive law is constantly supplemented by Von Bar's own comments. His aim is to discover common principles, without, however, abstaining from national particularities. Whether a European Code should be made on the basis of comparative study, is '*cura posterior*' (Vorwort) and according to him not the most important venture to be undertaken at the moment.⁶⁴

Apart from textbooks in which European private law is presented in one way or another, at least four projects aim at trying to develop *principles* of European private law. The establishment of principles seems indeed to be one of the most promising ways to develop a *ius commune*, as many authors have already emphasised.⁶⁵ Apart from the Lando project on contract law, to be discussed underneath, I should mention three projects. The first is the Casebooks for the Common Law of Europe project under the general editorship of Walter van Gerven. This project's aim is 'to help uncover the common roots of the different legal systems, not to unify them. In other words, to strengthen the common legal heritage of Europe, not to strangle its diversity'.⁶⁶ This is done by presenting factual situations with their various solutions under different legal systems (mainly those of England, France and Germany) in casebooks inspired by the American model. Casebooks on Tort Law, Contracts, Judicial Review of Administrative Action and Corporations are envisaged. The casebooks are designed to be of use as teaching material in the Universities of (mainly)

⁶⁰I leave aside articles and the recent books by, e.g., Martin Vranken, *Fundamentals of European civil law and impact of the European Community*, London 1997; Hans-Leo Weyers (hrsg.), *Europäisches Vertragsrecht*, Baden-Baden 1997; Nicolo Lipari (ed.), *Diritto privato europeo*, Padua 1997; Jürgen Basedow, *Europäisches Privatrecht*, Baden-Baden 1996; Ulrich Drobnig, *Private law in the European Union*, The Hague 1996; B. Schmidlin (ed.), *Vers un droit privé Européen commun*, Basel 1994.

⁶¹Hein Kötz, *European Contract Law*, Vol. I, Oxford 1997 (the English translation of *Europäisches Vertragsrecht*, I, Tübingen 1992); reviewed by E.A. Kramer, 62 *RabelsZ* (1998), 524; Part 2 has been partly published as Axel Flessner, *Befreiung vom Vertrag wegen Nichterfüllung*, 5 *Zeitschrift für Europäisches Privatrecht* (1997), 255.

⁶²A.S. Hartkamp et al (eds.), *Towards a European Civil Code*, 2nd. ed., Nijmegen 1998.

⁶³Erster Band, München 1996, reviewed by Tony Weir, 5 *European Review of Private Law* (1997), 433. Vol. 2 on, e.g., causation and the relationship between liability and insurance will be published later on. An English translation of the book will be published by OUP. Preliminary work was done in Christian von Bar, *Deliktsrecht in Europa*, Köln 1993.

⁶⁴cf. Von Bar, *ZfRv* 1994, 221.

⁶⁵Reiner Schulze, *Allgemeine Rechtsgrundsätze und europäisches Privatrecht*, 1 *Zeitschrift für Europäisches Privatrecht* (1993), 442; W. van Gerven, *Naar een Europees gemeen recht van algemene rechtsbeginselen?* 156 *RM Themis* (1995), 233.

⁶⁶Foreword to Walter van Gerven et al (eds.), *Torts; Scope of Protection*, Oxford 1998, v. (this volume is published as one of 8 chapters of the Casebook on tort law). See also W. van Gerven, *Casebooks for the common law of Europe; Presentation of the project*, 4 *European Review of Private Law* (1996), 67 at 69: aim is not to *create* uniform rules (as in the Lando project), but to *find* similar solutions and rules in the existing laws.

Western and Eastern Europe.

The second project to be mentioned here is the Trento Common Core Project, initiated by Ugo Mattei and Mauro Bussani. Inspired by the work of Schlesinger on formation of contract in the 1960's,⁶⁷ a rather large group of comparative lawyers from (mostly) European countries have united to seek the common core of the bulk of European private law in the fields of contract, tort and property. National reporters from the different EU countries design their national reports on the basis of questionnaires for different topics, made by the general editors (e.g. Good Faith (Zimmermann and Whittaker), Pure Economic Loss (Palmer and Bussani), Security in Movable Property (Storme)).⁶⁸ From a methodological point of view the Trento project is interesting. The initiators have explicitly considered the problem of cultural diversity and a possible unifying, 'culture killing', effect of the results projects like these entail.⁶⁹

'We do not wish to force the actual diverse reality of the law within a map to reach uniformity. We are not drafting a plan for something that will develop in the future and that we wish to affect. We are neutral in front of future developments. This project only seeks to describe the present complex situation in a reliable way. While we believe that cultural diversity in the law is an asset, we do not wish to take a preservationist approach. Nor we wish to push in the direction of uniformity'.

This is indeed a substantial cultural difference between this project and the one, initiated by the Lando Commission (see underneath), that is concerned with the future.

The third project I make mention of is undertaken by a group of scholars in the area of tort law, usually referred to as the 'Vienna-Tilburg Group'. On the basis of eight cases ('the Tilburg hypotheticals'), to be answered by scholars from eleven European countries and the United States, different outcomes in different jurisdictions are revealed. Furthermore, some general questions concerning, e.g., liability and insurance are discussed.⁷⁰ The philosophy behind this project is to consider some fundamental issues of tort law in order to 'shed new lights on choices made in our own legal systems' and to 'contribute to the reflection on, and further development of, all legal systems'.⁷¹ This, of course, is the 'classic' goal of comparative law; the Group envisages however also the formulation of European Principles of Tort Law, to be derived on the basis of the aforementioned activities.

These scholarly attempts to discover common Principles of European private law are (up till now) all characterised by the fact that they are non-political: the result of the comparative research is not laid down in concise rules, designed after the model of a Civil Code. In this respect, the method differs from the one, to be discussed underneath.

2.3.2 Soft Law as a Model: the Lando Principles

A method that has been given a lot of scholarly interest over the last three years or so, is the creation of a *ius commune* by drafting 'principles.' The Commission on European Contract Law, initiated by Ole Lando in the 1970's, has done so for the law of contract and has published part 1 of the Principles in 1995.⁷² What is interesting from a methodological point of view, is the use that

⁶⁷Rudolf B. Schlesinger (ed.), *Formation of Contracts: a study on the common core of legal systems*, Dobbs Ferry 1968.

⁶⁸Information on the project, e.g. the Introduction by Ugo Mattei and Mauro Bussani, can be found on the Internet (<http://www.gelso.unitn.it/card-adm/common.core>).

⁶⁹<http://www.gelso.unitn.it/card-adm/common.core/tnccommon.core.html>, p. 2 of 6.

⁷⁰The results so far have been laid down in two books: J. Spier (ed.), *The Limits of Liability*, The Hague 1996 and J. Spier (ed.), *The Limits of Expanding Liability*, The Hague 1998.

⁷¹Jaap Spier and Olav Haazen, Preliminary Observations, *The Limits of Expanding Liability*, 5-6.

⁷²Ole Lando, Hugh Beale (eds.), *The Principles of European Contract Law*, Part 1, Dordrecht 1995. Part 2 will probably be published in 1998. Cf. Ole Lando, Is codification needed in Europe? 1 *European Review of Private Law* (1993), 157; Madeleine van Rossum, Review Essay, 3 *Maastricht Journal of European and Comparative Law* (1996), 69; M.J. Bonell, *An International Restatement of Contract Law; The UNIDROIT Principles of International*

could be made of these Principles as a means of creating a European private law. Their most important function for that matter is that they can serve as a *model*: they are soft law, representing an ideal that is to be reached.⁷³ The Principles could inspire legislators, (arbitral) courts and contracting parties because of their persuasive authority.⁷⁴ As the best of all European legal systems is supposedly laid down in these Principles - they have been characterised as 'European *lex mercatoria*'⁷⁵ - the inspiration that could be drawn from these could indeed be important. It is most likely that if a national rule of contract law were to be interpreted in a 'European' way, the Principles could lead the way in doing so.⁷⁶

I will not dwell here upon the rapidly changing climate concerning the possible function of the Lando Principles. In the initial stages of the Principles project, they were not intended to create uniform law, as now a general feeling seems to be emerging that the Principles (or an amended version of these) could be incorporated into a future Civil Code.⁷⁷ As set out above in par. 2.2.1, the question of competence is triggered once more by this tendency.

2.3.3 The Comparative Law and Economics Approach

Finally, let me make mention of an approach to come to a *ius commune* that is inspired by the Law and Economics movement. Taking as a point of departure the importance legal transplants (i.e. the borrowing of legal institutions and rules by one country from another) have had for the development of private law, the so-called Comparative Law and Economics approach seeks the reason for a transplant in economic efficiency. Only *efficient* rules are allegedly transplanted. Ugo Mattei⁷⁸ for instance regards the reception of legal rules as the result of a competition, in which each legal system provides different rules for the resolution of a specific problem. In a 'market of legal culture', where rule suppliers seek to satisfy demand, ultimately, the most efficient rule will prove to be the winner.⁷⁹ Of course, as it is a rule of law and economics that a correct choice can only be made if all necessary information is available, one should be familiar with all the legal rules since otherwise it will not be possible for the most efficient rule to come out on top. History shows us many examples of the success of efficient legal transplants: e.g., rules on contract law have in the 19th century been exported by Germany to the common law world, nowadays many Anglo-American institutions (trust, lease, etc.) are borrowed by countries on the Continent.

Given the usefulness of this analysis, one could leave it to the legislature to codify the most efficient rule (as is propagated by Mattei).⁸⁰ My point of view however⁸¹ would be that it should be left to practice itself to find out what rule is to be used. If this rule has come out on top, it should be regarded as the best one for that period of time, leaving open the possibility that another rule could replace the previous one if practice would require so. This flexible approach would be impossible if the efficient rule was codified.

Commercial Contracts, Irvington NY 1994.

⁷³Petar Sarcevic, *Unification and 'Soft Law'*, *Conflits et harmonisation (Mélanges Von Overbeck)*, Fribourg 1990, 91.

⁷⁴Cf. Lando/Beale, ix; cf. Arthur Hartkamp, *The UNIDROIT Principles for International Commercial Contracts and the Principles of European Contract Law*, 2 *European Review of Private Law* (1994), 341.

⁷⁵Lando/Beale, xviii.

⁷⁶Cf. J.M. Smits, *Nederlandse invloed op het internationaal (contracten)recht*, in *Import en export van burgerlijk recht*, Deventer 1997, 127.

⁷⁷Cf. Caruso, 3 *ELJ* (1997), 12; Smits, 73 *NJB* (1998), 61.

⁷⁸Ugo Mattei, *Comparative Law and Economics*, Ann Arbor 1997; Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 *International Review of Law and Economics* (1994), 3.

⁷⁹Mattei, 14 *IRLE* (1994), at 8 and Ugo Mattei and Francesco Pulletini, 'A Competitive Model of Legal Rules', in Breton et al (eds.), *The Competitive State*, Dordrecht, 1991, 207.

⁸⁰Mattei, *Comparative Law and Economics*, 123.

⁸¹Smits, 73 *NJB* (1998), 65; cf. the criticism by O.A. Haazen, *Comparative Law and Economics en het Europees privaatrecht als ongemengd rechtstelsel*, 73 *NJB* (1998), 1227.

3. Markesinis' comparative approach

3.1 General Introduction

As said before, I will pay special attention to the views brought forward by Basil Markesinis in two recent books. The first book, *Foreign Law and Comparative Methodology*, is a collection of nineteen previously published articles, all written between 1978 and 1997, and a new introductory chapter, entitled the same as the book itself, in which the author tries to summarise the themes he has elaborated over the last twenty years. The second book, *The Law of Contracts and Restitution: a Comparative Introduction*, is a textbook in which German and English law are compared and of which Markesinis is the co-author. The overall theme of both books can be shortly summarised as persuading English lawyers (be they students, academics, practitioners or judges) of the benefits which are to be derived from comparative legal studies. It does thus not come as a surprise to find in the first book articles with such titles as *The Comparatist (or a Plea for a Broader Legal Education)*,⁸² *Il Ruolo Della Giurisprudenza Nella Comparazione Giuridica*,⁸³ *Bridging Legal Cultures*⁸⁴ and *Conceptualism, Pragmatism and Courage: A Common Lawyer Looks at Some Judgments of the German Federal Court*.⁸⁵ Other articles include Markesinis' classic study on *causa* and *consideration*⁸⁶ and some more recent publications on privacy and on tort law.

For the aim, Markesinis has set himself, he seems to have had the ideal qualifications from the outset. He was a law student in continental Europe and for many years a lecturer in the common law world (mainly England) and has thus been influenced by scholars and practitioners from both the civil law and common law world (a list of those who influenced Markesinis' legal mind - most of them comparative lawyers themselves - can be found on p. ix of *Foreign law and Comparative Methodology*). This goes with a profound personal belief in the benefits of comparative law study (already his thesis from 1972 was devoted to a subject of comparative (public) law⁸⁷). This does not mean Markesinis has not written on classic private law (he has been the co-author of two textbooks on tort law⁸⁸ and agency⁸⁹), but - as he has said himself - his 'real work' lies in the (comparative law) themes he tries to develop in his articles. I should say that his two comparative introductions to German law⁹⁰ are then somewhere in the middle since they contain the elaboration in substance of the methodology of his articles. To make this survey complete, I should add that it has not only been through his writing that Markesinis has tried to reach his aim, but also through the establishment of two institutes, one in Leiden (where he has been a professor since the 1980's), devoted to the study of Anglo-American law, and one in Oxford (where Markesinis became a professor in 1996 after many years in the University of London), devoted to European law.

3.2 The main themes of Markesinis' writings

The main themes of Markesinis' work - as described by himself in the methodology book (p. 3) - are fivefold. All of these themes lead the way to the very heart of the problems of modern comparative law, but the continental reader should bear in mind that transplanting these themes to

⁸² *Comparative Law and Methodology*, 15 sqq. (actually Markesinis' 1996 Oxford inaugural lecture).

⁸³ *Ibid*, 96 sqq. (originally published in 53 *Modern Law Review* (1990), 1 as *Comparative Law: A Subject in Search of an Audience*).

⁸⁴ *Ibid*, 194 sqq. (1993).

⁸⁵ *Ibid*, 211 sqq. (1986).

⁸⁶ *Cause and Consideration: a Study in Parallel*, in *ibid*, 47 sqq. (originally published in the *Cambridge Law Journal* (1978)).

⁸⁷ B.S. Markesinis, *The theory and practice of dissolution of parliament: a comparative study with special reference to the United Kingdom and Greek experience*, Cambridge 1972.

⁸⁸ R.W.M. Dias, B.S. Markesinis, *Tort Law*, Oxford 1984 (2nd. ed. 1989; 3rd. ed. 1994).

⁸⁹ B.S. Markesinis, R.J.C. Munday, *An Outline of the Law of Agency*, London 1979 (2nd. ed. 1986; 3rd. ed. 1992).

⁹⁰ The twin book of the one reviewed here, is B.S. Markesinis, *A Comparative Introduction to the German Law of Torts*, Oxford 1986 (2nd. ed. 1990; 3rd. ed. 1994). This book is now Vol. II of Markesinis, *The German Law of Obligations* and has as a subtitle *The Law of Torts: A Comparative Introduction*, 3rd. ed. 1997.

other European countries than England cannot be done without any problem. This is in particular true for the first theme, to be summarised as the creation of an audience for the subject of comparative law. This, indeed, has always been more difficult in England than it was in the rest of Europe. Markesinis points out that in England studying law was always seen as a preparation for a profession and because in that profession, there was no need for comparative law, students were not interested. I must add that on the continent, where law was (and still is) much more seen as a science, the call for comparative law study was usually bigger (although this should not be exaggerated⁹¹).

The capital question, of course, is *how* the comparison between legal systems is to be made if one wants to create an audience as big as possible. One must show his audience the advantages of comparing legal systems. Markesinis claims that the case law method provides the lecturer with so many advantages that this method should be regarded as the best. At least three advantages can be listed (p. 4-5). Firstly, students of foreign law feel comfortable in a factual environment they recognise. If the results in different countries are the same, they will lose their scepticism towards foreign law and will become enthusiastic about its use for national practice. Secondly, by using cases, one is able to put the concepts aside and to try 'to discover the real but unexpressed policy issues' (and thus similarities) that lie behind the factual situations (p. 4). To examine a system by only looking at its concepts, would not be very fruitful. And thirdly, one is able to bridge the gap between civil law and common law in this 'functionalist' approach.

The results Markesinis is able to reach by working with the case method in not only the articles in the methodology book, but in particular in his comparative textbook (written with two German colleagues), are impressive. Before I say something about these results, let me first introduce the textbook. It has already been described as 'enormously useful'⁹² and as 'formidable',⁹³ and indeed it is. In nearly 1000 pages, and after a general introduction to German private law (on the history and structure of the *Bürgerliches Gesetzbuch* and the principles of German contract law⁹⁴), eight subjects are discussed in eight different chapters on formation of contract, the policing of contract, relaxations of contractual privity, the performance of contract, irregularities of performance, good faith, remedies and restitution. Each chapter consists out of a commentary on the subject, followed by (translated) cases (up to a total of 141), decided upon by German courts. Appendixes contain translated extracts from the *Bürgerliches Gesetzbuch* and the *Allgemeine Geschäftsbedingungen-Gesetz* and a Glossary of German legal Terms. A Table of Cases and an Index are indispensable.

In his preface to the textbook, Markesinis points out that it is designed as an introductory work, mainly aimed at students; if practitioners would use it, he would regard it as 'an extra bonus'. This is very modest and not entirely in line with Markesinis' views on the importance of exchange of ideas between different legal systems (see below). Methodologically interesting is that Markesinis deliberately uses one of the classic fallacies of comparative law as a way to describe German law. In classic comparative law theory, one is warned to describe foreign law as objectively as possible, given one's own national legal and cultural heritage.⁹⁵ But an objective description is not what Markesinis aims at: he aims at the 'anglicization' of German law, i.e. 'to present the information it contains about German law in a way that is intelligible to and usable by Common lawyers' (preface). This implies that in his commentary, the author shows how a German case would be solved in English law and vice versa. The author first had to *deconstruct* German law

⁹¹See for a recent study on the influence of foreign law in The Netherlands: J.M. Milo, *Het rechtsvergelijkende argument in de ontwikkeling van het Nederlands vermogensrecht 1838-1940*, doctoral thesis Maastricht 1997.

⁹²Antje Kunst, Book Review, 47 *International and Comparative Law Quarterly* (1998), 739.

⁹³Konrad Schiemann, Book Review, 114 *Law Quarterly Review* (1998), 515.

⁹⁴The text was previously published in the 1997 *Festschrift* for Roy Goode and republished in *Foreign law and Comparative Methodology*, 68.

⁹⁵cf. Zweigert/Kötz, 32.

(organised through Pandectist structuralism) and then had to *reconstruct* it along common law lines! In my opinion, this leads to very remarkable results in the chapters on, e.g., policing the contract and remedies: the German Pandectist influence has been rather large in these fields of study and as Markesinis describes these subjects for the reader who *has* been trained in the Pandectist tradition, it is not only as if one understands German *and* English law better,⁹⁶ but also as if one is 'submerged in an oxygen bath'.⁹⁷ The advantages of this method culminate in the chapter on the principle of good faith (p. 510 sqq). It is nearly impossible to make a common law lawyer aware of the meaning good faith has in continental law; Markesinis however seems to succeed as he starts his commentary with the thoughts that come to the mind of an Anglo-American lawyer when he is confronted with the concept of 'good faith'. By discussing these thoughts, the author is able to give an excellent survey of the role good faith plays in German law.

I must admit that my sympathy lies very much with Markesinis' 'anglicising' method since it contributes in a very down to earth manner to the exchange of legal rules and ideas from one country to another: common law students and practitioners do not have to go into the German way of thinking, but the possible assets of looking at German law have already been made clear for the common law world; all they have to do, is pick up the markers Markesinis has left.

If some criticism would have to be given however, it would be that Markesinis' method is only right in a very practical sort of way; from a pure scholarly point of view, many fallacies of the functionalist approach come to the surface. Legrand for example would object that to use cases as 'springboards into the ever-deeper waters of a foreign culture' (preface of *The Law of Contract and Restitution*) by deconstructing them first and reconstructing them then along common law lines, would be to 'terrorise' German law.⁹⁸ According to Legrand, German and English law are 'two discrete epistemological formations'.⁹⁹ characteristic for English law would be its *suppressing* the search for a single determinate rationalisable order, as German law is characterised by *promoting* such an order. Legrand asserts, these *mentalités* are irreducibly different: to transplant legal rules from one *mentalité* to the other, is to destroy the very essence of that rule. On this point, I would have been curious to know what Markesinis' opinion about Legrand's objections would have been. Of course, Markesinis' methodology is mainly worked out by 'just doing it', not by theoretical elaborations, but as Legrand's objections are also directed at the *practice* of comparative law, I feel Markesinis should comment on these. In my opinion, Markesinis stands midway between the two evils, so eloquently described by Oliver Wendell Holmes, who once wrote that the study of civil law 'tends to encourage a dangerous reliance (...) on glittering generalities' whereas the case method encourages 'the exhaustive analysis of a particular case with which the common law begins and ends'.¹⁰⁰ Markesinis brilliantly shows how the generalities and the cases can be mixed.

As we return to the survey of Markesinis' themes, the second theme to be mentioned here, is an 'ideological belief' in Europe (p. 6). Not only is it Markesinis' purpose to emphasise similarities rather than differences between the various European legal systems by teaching through the case law method. He also admits that on the background of this 'legal' goal, he has a firm belief in European unity, perhaps not consisting in European uniformity, but then, at least, in 'mutual understanding and respect as well as an awareness that we have more things that unite us than we have that divide us' (p. 7). By proclaiming this belief in Europe, Markesinis has given his method a political goal; this leaves unaffected that one does not have to believe in European unity

⁹⁶One of the many advantages of the comparative method. Cf. Gordley's 'transnational method': James Gordley, Comparative Legal Research: Its Function in the Development of Harmonized Law, 43 *American Journal of Comparative Law* (1995), 555.

⁹⁷As Kötz (cited by Markesinis, 131) has called it when a German lawyer reads a good common-law judgment.

⁹⁸Cf. Legrand, 60 *MLR* (1997), 62.

⁹⁹*Ibid.*, 48.

¹⁰⁰Holmes in 1871, cited in: Gordley, 43 *AJCL* (1995), at 559.

to defend the method Markesinis propagates.

The third theme can be described as the promotion of a comparative law approach, not only by using the case law method in the universities, but also by directly attracting the attention of the judges and by convincing them of the advantages of relying on foreign law in their judgments.¹⁰¹ This strategy is typically English: after all, in England, not the academics but the judges are the 'senior partners' of the law-making process (p. 7). It could very well be that this makes it even more difficult to attain this goal. The author writes that a true change of mentality in legal England is needed for that matter; and since mentality is a 'human' thing, Markesinis has through his writings tried to persuade English lawyers to overcome the mentality block and to get interested in what happens abroad.¹⁰² The success of this approach became evident when the House of Lords used foreign material in *White v. Jones*.¹⁰³ In the leading opinion of Lord Goff of Chieveley, references were made to Lorenz, Kötz and Markesinis and to, e.g., German and Dutch case law. This approach of attaining a European private law through the movement of ideas (p. 201), in other words by propagating that judges draw interpretive inspiration (p. 207) from foreign law, is also in my opinion very attractive. It is not only a method that gives supremacy to practice in creating a *ius commune*, from a theoretical point of view 'terrorising' the other legal system's *mentalité* is impossible since the *importing* judges themselves decides to what extent foreign law is introduced. Of course, an internationalistic mentality would have to emerge, but on the whole Markesinis is optimistic about that, although there are signs that 'culture, tolerance, and universalism' are under serious threat (p. 30).

The two final themes of Markesinis' work - in my view less important to characterise it - are the ambition to look at law in a broader context and to challenge widely-held assumptions. Under this heading, Markesinis' ambition to benefit from the historical-comparative approach as practiced in Germany by civil lawyers like Zimmermann, should be mentioned. It implies that he has not confined himself to the mere study of comparative law, but has involved legal history in his work as well.¹⁰⁴ In his articles about insurance aspects of tort law and the litigation practice in England, Germany and the United States (also reprinted in the book on methodology), Markesinis has embarked upon the use of statistical material to better understand differences and similarities between various legal systems.

To me, it is without much doubt that Markesinis has shown us in the two books under review one of the most promising ways towards a *ius commune europaeum*. It is, when all is said and done, a fruitful approach to the borrowing of legal rules from other legal systems, or, to put it another way, a method of having yourself inspired by foreign law, regardless what branch of the law you are in.

¹⁰¹See, in particular, The Destructive and Constructive Role of the Comparative Lawyer (at 36 sqq.), an article that is very representative for the book.

¹⁰²This 'spirit of open-mindedness and internationalism' (p. 195), Markesinis has tried to bring about, not only by writing articles, but also by editing B.S. Markesinis (ed.), *The Gradual Convergence*, Oxford 1994 (reviewed by Nigel Foster, 44 *International and Comparative Law Quarterly* (1995), 243).

¹⁰³*White and Carter v. McGregor* [1962] 1 WLR 1314.

¹⁰⁴cf. p. 26: 'the past often explains what may otherwise be obscure in the present'.